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No. 93-418

In the Supreme Court of the United States

OCTOBER TERM, 1993

SOUTHERN TIMBER PURCHASERS COUNCIL, ET AL.,
PETITIONERS

v.

MARVIN C. MEIER, ACTING REGIONAL FORESTER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' claims for declaratory and injunctive relief against a temporary policy that restricted timber harvesting methods in habitat areas of a particular endangered species are moot because the challenged policy is no longer in effect.

2. Whether the court of appeals erred in determining that petitioners lacked standing to sue for alleged violations of the National Environmental Policy Act, the Endangered Species Act, and the National Forest Management Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 993 F.2d 800. The district court's July 29, 1991, order (Pet. App. 22a-40a) is reported at 779 F. Supp. 1353. The district court's August 8, 1990, orders (Pet. App. 41a-50a, 51a-59a) are unreported. The district court's April 23, 1990, order (Pet. App. 60a-74a) is reported at 736 F. Supp. 267.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1993. The petition for a writ of certiorari was filed on September 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*, requires the Secretary of the Interior to identify species that are "endangered," *i.e.*, in danger of extinction throughout a significant portion of their range. See 16 U.S.C. 1532(6), 1532(20), 1533. Section 7(a)(2) of the Act requires each federal agency to ensure that agency actions are "not likely to jeopardize the continued existence of any endangered species." 16 U.S.C. 1536(a)(2). Thus, federal agencies are prohibited from authorizing, funding, or carrying out any "action" that is "likely to jeopardize the continued existence of" any endangered species. To ensure that those prohibitions are respected, Congress established a procedural "consultation" requirement. Under that procedure, the responsible agency consults with the U.S. Fish and Wildlife Service (FWS) of the Department of the Interior to determine whether (and to what degree) there may be adverse effects on a particular species as a result of the contemplated agency action. 16 U.S.C. 1536(a)-(d).

b. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires federal agencies to "include in every recommendation or report on * * * major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on * * * (i) the environmental impact of the proposed action." 42 U.S.C. 4332(2)(C). The Council on Environmental Quality (CEQ) has issued regulations governing an agency's decision to prepare such an Environmental Impact Statement (EIS) for a proposed action. 40 C.F.R. Pts. 1501, 1502.

c. The National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*, requires the Forest Service to develop "land and resource management plans" for each unit of the National Forest System. 16 U.S.C. 1604(a). Those forest plans must provide for a sustained yield of resources and for multiple use of National Forest lands, including "coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. 1604(e)(1). The development of each such plan, and of any "significant" amendment to a plan, is subject to a set of specified procedures before adoption, including preparation of a draft and a final EIS for any proposed or "significant[ly]" amended plan. See 16 U.S.C. 1604(g); 36 C.F.R. 219.10(b) and (f).

Each forest plan provides general goals and objectives, and also establishes standards and guidelines to govern actions and activities, such as timber harvests, that take place in the forest. Those standards and guidelines are intended to protect resources such as threatened and endangered species, and are adopted following consultation with the FWS in accordance with Section 7(a) of the ESA.

A forest plan is essentially a programmatic statement of intent that operates prospectively. It establishes basic guidance and sets forth the planning elements that the Forest Service will employ in making future site-specific decisions. See *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508, 1511-1512 (9th Cir. 1992). The plan, however, does not constitute assurance that the plan's output targets will be achieved. Rather, actual output levels will be affected by such variables as economic conditions, funding levels, and site-specific circumstances con-

cerning the particular actions that may be proposed. Furthermore, unless it states otherwise, a plan does not constitute a decision to undertake any particular site-specific action.

2. a. The red-cockaded woodpecker (RCW) ranges in the southeastern United States—from Virginia, along the coastal plain, into Texas. The bird is dependent on several species of southern pines for nesting and foraging, and it lives in groups called clans, whose members inhabit the cavities excavated in a group of trees known as a colony site. The bird needs foraging habitat with certain specific characteristics in close proximity to the colony site. Pet. App. 2a-3a.

Extensive clearing of southern pine forests has reduced available habitat for the RCW and brought it to the brink of extinction. The species accordingly was listed as endangered in 1970. The vast majority of the remaining clans of the bird occupy colony sites that are on federal lands, principally in the various National Forests in the Southern Region (Region 8) of the National Forest System. Pet. App. 3a.

Since 1985, the Southern Region has undertaken to protect the RCW in accordance with the most recent revision of the RCW Chapter of the Forest Service Wildlife Habitat Management Handbook. The RCW chapter was prepared through formal consultation with the FWS under Section 7(a) of the ESA, 16 U.S.C. 1536(a). It is based upon the Red-Cockaded Woodpecker Recovery Plan issued in 1985 by the FWS, and provides measures to protect and conserve the bird. The Forest Service incorporated the RCW chapter into the forest plans for those forests having RCW populations. Pet. App. 3a-4a.

b. The Forest Service and the petitioner timber companies entered into timber sale contracts subject to the 1985 handbook chapter. Those contracts contain an endangered species provision specifying that "[i]f protection measures prove inadequate, * * * [the] Forest Service may * * * unilaterally modify this contract to provide additional protection" for an endangered species. Timber Sale Contract provision CT6.25#, *reproduced in* Defendants' Motion to Dismiss, Exhs. 3-5 (filed Feb. 12, 1990). The contracts also include a disputes clause stipulating that the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*, is applicable to "all disputes arising under or relating to th[e] contract" (contract provision CT9.2(b)), as well as a provision permitting either party to seek modifications by agreement for any reason (contract provision BT8.3).

Subsequent to the adoption of forest plans and the award of contracts subject to the 1985 handbook chapter, the Forest Service learned from updated RCW inventories that RCW populations in several National Forests were unstable or declining. Compare Administrative Record, Tab 20 (AR 20) (1986 RCW colony data) with AR 24, at 2 (1988 RCW colony data). That information, coupled with the Forest Service's obligation under Section 7(a)(2) of the ESA to ensure that agency actions are "not likely to jeopardize the continued existence of any endangered species," 16 U.S.C. 1536(a)(2), caused the Regional Forester of Region 8 to develop a new RCW-protection strategy, in coordination with both petitioner Southern Timber Purchasers Council (then known as the Region 8 Forest Service Timber Purchasers Council) and the Sierra Club Legal Defense Fund.

Pet. App. 4a, 97a; see also AR 34, 37, 38, 49, 51, 56, 58, 59, 64, 66.

The Regional Forester's new strategy for protection of the RCW in Region 8 was announced on March 27, 1989. Pet. App. 4a, 98a. The strategy included three phases:

> (1) the immediate adoption of a temporary "policy on cutting on existing timber sale contracts within 3/4 mile of active and inactive RCW colonies," to be "implemented within active populations [of] less than 250 active colonies" (Pet. App. 98a);
>
> (2) the development and issuance of "Interim RCW Guidelines * * * which will supersede the existing RCW Handbook direction for those areas within 3/4 mile of RCW Colonies in populations with less than 250 active colonies," and which "will apply to future sales and currently advertised or proposed sales that have been withdrawn and will remain in effect until the Region 8 Regional Guide is amended" (*id.* at 99a); and
>
> (3) amendment of the Region 8 Regional Guide (*ibid.*).

The strategy's first phase—adoption of the temporary policy at issue in this case—was intended to "supplemen[t]" the handbook by "establish[ing] new protection measures for the endangered red-cockaded woodpecker determined necessary to ensure that any action authorized, funded or carried out by the Forest Service is not likely to jeopardize its continued existence." *Id.* at 98a. That temporary policy was made applicable to already awarded sales, as well as "award

pending" contracts, advertised timber sales, and proposed sales. *Id.* at 99a-105a.

The temporary policy limited the permissible methods for timber harvesting within 3/4 mile of a colony site. It also directed the contracting officer immediately to request affected purchasers "to suspend all logging operations on the affected payment units" in accordance with contract provision CT6.25#, and immediately to begin modifying existing contracts "to align them with the policy." Pet. App. 102a-103a. The policy stated a strong preference for "modify[ing] the contract by mutual agreement under BT8.3 to delete individual payment units," and it directed the contracting officers to "[m]ake maximum possible effort to provide timber for deleted volumes" by mutual contract modification. *Id.* at 103a. The policy, however, also permitted both unilateral contract modification under the provision for protection of endangered species, and cancellation of contracts "if the modification changes the sale conditions significantly and the purchaser is unable to recover the original profit margin." *Id.* at 104a.

Petitioners had a total of nine contracts subject to the policy. In light of issuance of the policy, petitioners agreed to modify each of those contracts by substituting other timber lands for those affected by the policy and/or by reducing the payments due to the Forest Service under the contract. Defendants' Motion to Dismiss, Exhs. 6-14 (filed Feb. 12, 1990).

3. On March 31, 1989, petitioner Southern Timber Purchasers Council (Council) administratively challenged the Regional Forester's March 27, 1989, issuance of the temporary policy, alleging violations of NEPA, NFMA, and the Administrative Procedure

Act (APA). AR 30. On April 14, 1989, the Forest Service Deputy Chief ruled that adoption of the policy was not subject to administrative appeal under the applicable regulation, 36 C.F.R. 217.3(a)(1). Pet. App. 94a-96a. At the same time, however, the Deputy Chief directed the Regional Forester to "conduct an environmental analysis and then prepare the appropriate decision document for the policy," with appropriate reference to compliance with ESA, NEPA, and NFMA in establishing the policy. *Id.* at 95a. The Regional Forester subsequently complied with that directive by issuing a biological evaluation on May 3, 1989 (AR 24), and by issuing NEPA and NFMA decisions that "document the rationale and environmental consideration for" the policy on June 26, 1989. AR 16, at 1.

On July 12, 1989, the Council administratively appealed the Regional Forester's June 26 decision, asserting that the decision and the March 1989 policy violated NEPA, the APA, NFMA and its implementing regulations, and the ESA. AR 13. The Council's request for a stay of the decision (AR 13, at 1, 21) was denied on July 25, 1989. AR 8. On September 1, 1989, the Council also sent a letter to the Secretaries of Agriculture and the Interior purporting to give notice of petitioners' intent to file a citizen suit under 16 U.S.C. 1540(g) for alleged violations of the ESA. AR 3.

On October 25, 1989, the Associate Deputy Chief of the Forest Service affirmed the Regional Forester's June 26 decision. Pet. App. 75a-93a. The decision rejected the Council's claims of NEPA, ESA, and NFMA violations, and it emphasized the reasonableness of preserving the environmental status quo "[i]n

the face of small, unstable, and declining RCW populations." *Id.* at 89a. Because the Secretary of Agriculture elected not to conduct discretionary review of the decision, the Associate Deputy Chief's decision was "the final administrative decision of the Department of Agriculture." 36 C.F.R. 217.16(e).

4. On December 7, 1989, petitioners filed a complaint for declaratory and injunctive relief in the United States District Court for the Northern District of Georgia. The complaint purported to "challenge two actions by [respondents] regarding the red-cockaded woodpecker" (C.A. R.E. 13, ¶ 1): (1) "the Forest Service Region 8's failure to fully implement" the RCW chapter in the 1985 handbook, which petitioners asserted to have been a violation of the ESA (*id.* at 14, ¶ 2); and (2) the "illegal adoption" of the March 1989 policy, which they asserted to have violated the ESA, NFMA, and NEPA (*id.* at 14-15, ¶ 3).

On April 23, 1990, the district court dismissed petitioners' NEPA claims for lack of standing. Pet. App. 60a-74a. The court concluded that petitioners were not within the "zone of interests" protected by NEPA, because their "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit" to proceed. *Id.* at 66a.

On August 8, 1990, the court dismissed petitioners' ESA claims. Pet. App. 51a-59a. Thereafter, the court granted summary judgment for the government on petitioners' remaining claims. *Id.* at 22a-40a. The court entered judgment on July 30, 1991.

5. On May 25, 1990, during the pendency of the district court litigation, the Forest Service implemented the second phase of its new strategy for protection of the RCW by issuing Interim Standards and Guidelines for the management of RCW habitat. Pet. C.A. Br. addendum, Tab 7, at 2. The interim standards supersede the temporary policy at issue in this case. The issuance of the new standards and guidelines followed an opportunity for public comment and review by the FWS, and it was accompanied by new decision documents, including a decision notice, an environmental analysis (EA), and a biological evaluation. *Id.* at 2, 4.

The district court rejected the government's contention that petitioners' challenge to the temporary policy was rendered moot when that policy was superseded by the Interim Standards and Guidelines. Pet. App. 57a-58a. The Council administratively challenged the Interim Standards and Guidelines, but that challenge was rejected by the Department of Agriculture in a final decision issued October 24, 1991. See Pet. C.A. Br. addendum, Tab 7. Petitioners apparently have not sought judicial review of that decision.

6. The court of appeals affirmed the district court's judgment dismissing petitioners' claims. Pet. App. 1a-21a. Although petitioners asserted that the Forest Service's temporary policy caused them to suffer economic, environmental, procedural, and "quality of life" injuries (*id.* at 8a-9a), the court concluded that petitioners had "failed to establish an injury to themselves sufficient to confer standing." *Id.* at 20a.

The court of appeals first rejected petitioners' reliance on the alleged economic injuries resulting from issuance of the temporary policy. Pet. App. 13a-14a. Petitioners claimed that the policy reduced the quantity of timber available under their timber contracts with the Forest Service and increased their costs under those contracts. The court concluded, however, that because the contracts explicitly provide that "all disputes arising under or relating to" the contracts must be resolved pursuant to the process set forth in the Contract Disputes Act, which vests judicial review exclusively in the Court of Federal Claims (41 U.S.C. 609(a)(1) (Supp. IV 1992)), petitioners could "not predicate their standing to sue * * * upon contractual injuries." Pet. App. 14a.

In addition, the court rejected petitioners' claims of standing based on economic injury relating to future timber contracts, both because "the Council and Timber Companies have no right to compel the Forest Service to sell any future timber to them" and because, even if they had such a right, "there is not a 'substantial likelihood' that this injury will be redressed by the relief they seek." Pet. App. 15a. The court also rejected petitioners' claims of "quality of life" injuries, explaining that those claims were "simply attenuated versions of the economic injuries" asserted by petitioners, and therefore "suffer from the same infirmities." *Id.* at 16a.

The court held that petitioners' claims of environmental injuries were insufficient to support standing because those claims amounted to "nothing more than an interest in developing [RCW] strategies, and a mere interest in a problem, no matter how longstanding the interest, is insufficient to confer standing."

Pet. App. 17a. The court likewise rejected petitioners' attempt to assert the interests of their employees in the outdoors, noting that plaintiffs generally "must assert their own rights and may not rest upon the rights of others" and that the requirements for third-party standing were not satisfied in this case. *Id.* at 18a. Finally, relying on *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130 (1992), the court held that petitioners could not base standing on claims of procedural injury without also showing injury to separate, concrete interests. Pet. App. 19a-20a.

ARGUMENT

1. Petitioners contend that the court of appeals erred in holding that they lacked standing to challenge the Forest Service's temporary policy adopted in March 1989. There is no reason for this Court to consider that contention, however, because petitioners' claims with regard to the temporary policy are moot.

a. A case becomes moot, and thus nonjusticiable, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 396 (1980). Moreover, "[i]t is not enough that a controversy existed at the time the complaint was filed." *Deakins* v. *Monaghan*, 484 U.S. 193, 199 (1988). "The parties must continue to have a '"personal stake in the outcome"'" at all stages of a case. *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990).

Petitioners do not currently possess a "legally cognizable interest" or "personal stake" in the out-

come of this case.[1] The only remedies petitioners sought with respect to their claims of economic injury were a declaration that the temporary policy was invalid, an injunction against its enforcement, and a remand to the Forest Service to reconsider the policy. C.A. R.E. 30, ¶¶ 1, 2, and 5 (Complaint, Request for Relief). The temporary policy is no longer in effect, however, having been superseded by the Interim Standards and Guidelines more than three years ago, on May 25, 1990. Thus, petitioners' alleged economic injuries would not be alleviated even if they were to receive the relief they seek.

Moreover, petitioners voluntarily modified their timber contracts by mutual agreement with the Forest Service in order to facilitate compliance with the temporary policy, and they did so long before filing their complaint in this case. See Defendants' Motion to Dismiss, Exhs. 6-14 (filed Feb. 12, 1990). As part of those contract modifications, petitioners received ample consideration, in the form of additional areas to be logged and/or reductions in their payment obligations to the Forest Service, in exchange for their agreements to modify the contracts. *Ibid.* In accepting the benefits provided by the contract modifications, petitioners have already been compensated for any asserted injuries resulting from issuance of the temporary policy. They thus have no live claim

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[1] The district court rejected the government's assertion of mootness. Pet. App. 57a-58a. The court of appeals did not address the mootness issue in its decision, although we have been informed that the issue was raised at oral argument.

with regard to their preexisting contracts for which they could obtain relief.[2]

In these circumstances, petitioners' claims for injunctive and declaratory relief with regard to the temporary policy are moot. Petitioners are not suffering any present injury that could be remedied by granting them the relief they seek, and thus they have no "'specific live grievance' against the application" of the policy. *Lewis* v. *Continental Bank Corp.*, 494 U.S. at 479. This Court therefore lacks jurisdiction to adjudicate petitioners' claims. *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 70 (1983) (per curiam).

b. The district court recognized that the temporary policy had ceased to be effective due to its replacement by the Interim Standards and Guidelines, but found petitioners' challenges to the policy nonetheless justiciable under the exception to the mootness doctrine that permits adjudication of claims that are "capable of repetition, yet evading review." Pet. App. 57a-58a; see *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). The court justified its conclusion on the grounds that "[petitioners] may reasonably expect that [the government] will significantly alter future forest plans without following

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[2] Morever, as petitioners concede (Pet. 13-14), they are not seeking monetary compensation for any injury allegedly caused by adoption of the temporary policy. Thus, this case would be moot even if petitioners had not agreed to modify their contracts with the Forest Service in exchange for adequate consideration, because there is no meaningful non-monetary relief that can now be granted to petitioners. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-110 (1983) (finding no case or controversy with respect to claim for injunctive relief even though plaintiff's claim for money damages was not moot).

Forest Act procedures," and that "[e]ven with the adoption of a new woodpecker plan, [petitioners] have still been denied the procedure to which they assert they are due." Pet. App. 58a. The court concluded that the Forest Service "cannot evade review by continuously adopting short term woodpecker plans." *Ibid.*

Petitioners' claims do not fall within the exception for cases that are capable of repetition, but evading review. That exception applies only where "there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. at 149. Petitioners have no reasonable expectation that they will again be subjected to the same allegedly illegal agency conduct that led to promulgation of the temporary policy.

Petitioners' allegations in this case concern claims of procedural and substantive errors under NEPA, the ESA, and NFMA with regard to the adoption of the temporary policy, not the subsequent Interim Standards and Guidelines. The standards and guidelines were issued after preparation of a different environmental assessment and decision notice under NEPA and NFMA and a different ESA biological evaluation with concurrence from the FWS. Pet. C.A. Br. addendum, Tab 7, at 2, 4. While petitioners may claim errors in the adoption of the standards and guidelines, resolution of those entirely distinct claims would depend on review of the administrative record underlying adoption of the standards and guidelines, not the record developed for the temporary policy announced in March 1989.

In effect, the district court was able to conclude that this case is "capable of repetition" only by

equating two entirely different agency actions—adoption of the temporary policy and adoption of the Interim Standards and Guidelines—and by improperly presuming that the Forest Service would repeat the alleged errors that led to issuance of the temporary policy. There is no basis for concluding, however, that the issues in any future challenge by petitioners to the Forest Service's RCW policies would be the same as those raised in this case. Moreover, the Forest Service, like other agencies, "is entitled to a presumption of regularity," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971), and thus it was improper for the district court to assume that petitioners' claims of illegal agency practice would arise in the future. See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 109 (1983) ("the capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality"). Accordingly, the district court erred in concluding that petitioners' challenge to the policy was not moot.

2. Petitioners contend (Pet. 11-18) that the court of appeals erred in concluding that petitioners' allegations of injuries to their economic interests under their timber contracts did not provide standing to sue in federal district court. According to petitioners (Pet. 12), the court of appeals improperly "collapsed two separate questions—the question of standing, and that of the exclusive jurisdiction of the Court of Federal Claims—into one," in conflict with "the approach employed by other circuits." That contention does not merit further review.

None of the cases cited by petitioners as evidence of a circuit conflict (see Pet. 12 n.9, 15-17) holds that plaintiffs in the position of petitioners possess standing to sue in federal district court. Indeed, most of those cases do not discuss standing at all, but focus instead on the analytically distinct question of subject matter jurisdiction under 28 U.S.C. 1346(a)(2). The only case cited by petitioners that does discuss an analogous issue of standing, *National Helium Corp.* v. *Morton*, 455 F.2d 650 (10th Cir. 1971), provides no support for petitioners' claim of a circuit conflict.[3]

National Helium involved a NEPA suit brought by federal contractors against the government. The court expressly declined to hold that the plaintiffs' claims of economic injury arising out of their federal contract were sufficient to establish standing to sue in federal district court. Indeed, the court noted that "federal question jurisdiction would be perhaps somewhat tenuous" if the plaintiffs in that case had relied solely on their own economic interests as a basis for standing. 455 F.2d at 654; see also *id.* at 655 (implying that jurisdiction would have been absent if the plaintiffs had been "motivated solely by protection of their own pecuniary interest"). The court concluded, however, that the plaintiffs' "asserted repre-

[3] In *Wabash Valley Power Ass'n* v. *Rural Electrification Admin.*, 903 F.2d 445 (7th Cir. 1990), the court discussed principles of standing in holding that a power company could contest a proposed rate increase because, *inter alia*, the rate increase would likely lead to imposition of penalties on the company by state regulators. 903 F.2d at 451-452. That ruling is entirely unrelated to the standing issue decided by the court of appeals in this case, and thus the decision in *Wabash Valley* is not inconsistent with the decision below.

sentation of the public interest" in enforcement of NEPA provided a basis for judicial review. *Id.* at 654. Thus, *National Helium* did not decide the question that petitioners seek to raise in this Court, and it therefore does not support petitioners' claim of a circuit conflict on that question.[4]

The decisions cited by petitioners are inapposite for another reason as well. In each of those cases, the question of jurisdiction turned on whether the plaintiffs' claims were "founded upon any express or implied contract with the United States" within the meaning of 28 U.S.C. 1346(a)(2). In this case, by contrast, it is indisputable that "all disputes arising under or *relating to*" petitioners' contracts with the Forest Service are governed by the Contract Disputes Act, 41 U.S.C. 601 *et seq.* See Timber Sale Contract provision CT9.2(b) (emphasis added); see also 41 U.S.C. 605(a) (Contract Disputes Act applies to "[a]ll claims by a contractor against the government *relating to* a contract") (emphasis added). The Contract Disputes Act establishes a detailed scheme for administrative review of disputes involving the government's contractual relationships with private parties, and it vests jurisdiction to review such administrative determinations in the Court of Federal Claims. 41 U.S.C. 609(a)(1) (Supp. IV 1992).

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[4] To be sure, *National Helium*'s holding that the generalized "public interest" in enforcement of environmental laws suffices to establish standing to sue, if extended to this case, would lead to the conclusion that petitioners—or, for that matter, anyone else—have standing to assert their claims. That holding, however, is plainly not good law in light of subsequent decisions of this Court (see, *e.g.*, *Sierra Club* v. *Morton*, 405 U.S. 727, 734-740 (1972)); petitioners make no claim to the contrary.

Thus, regardless of whether petitioners' claims would have been properly characterized as "founded upon" their federal contracts within the meaning of 28 U.S.C. 1346(a)(2), the district court lacked jurisdiction to the extent those claims "relat[e] to" those contracts. Petitioners' claims of economic injury to existing contractual rights plainly "relat[e] to" their contracts, and thus those claims should have been brought in the Court of Federal Claims.

Moreover, as petitioners concede, "a claim of *breach* of * * * contract (if there existed a viable claim of breach) would fall within the exclusive jurisdiction of the Court of Federal Claims." Pet. 12. Properly viewed, that is precisely the nature of petitioners' claims with respect to their preexisting timber contracts. Petitioners' contracts contain an endangered species provision specifying that "[i]f protection measures prove inadequate, * * * [the] Forest Service may * * * modify this contract to provide additional protection" for an endangered species. Timber Sale Contract provision CT6.25#, *reproduced in* Defendants' Motion to Dismiss, Exhs. 3-5 (filed Feb. 12, 1990). It is undisputed that the Forest Service issued the temporary policy in March 1989 "to provide additional protection" for the RCW as a result of the Forest Service's determination that "protection measures prove[d] inadequate." Thus, petitioners' complaint that adoption of the policy violated certain statutory requirements to the detriment of petitioners' contractual interests amounted to nothing more than a claim that the Forest Service breached its contracts with petitioners by relying on an illegally adopted policy as a basis for contract modification.

The fact that petitioners purported to proceed under the Administrative Procedure Act (APA) rather than a contractual theory is irrelevant. The APA authorizes judicial review of final agency action "for which there is no other adequate remedy in a court." 5 U.S.C. 704. There is no question that petitioners have an adequate alternative remedy for the assertion of their claims of economic injury to their contract rights—namely, the comprehensive remedy provided by the scheme of administrative and judicial review established pursuant to the Contract Disputes Act.[5] Petitioners have failed to demonstrate that that remedy is inadequate, and in any event that narrow question is not itself worthy of review.

3. Petitioners also assert (Pet. 18-22) that the court of appeals erred in rejecting their claims of future economic injury arising out of the temporary policy's alleged effect on future timber contracts. According to petitioners, the court of appeals' ruling on that issue conflicts with decisions by this Court and the courts of appeals. That contention is without merit.

To establish Article III standing, a plaintiff must allege personal injury-in-fact. The requisite injury cannot be "[a]bstract," "hypothetical," or "conjectural," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974);

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[5] Moreover, because the Contract Disputes Act specifies the Court of Federal Claims as the appropriate court in which to seek judicial review of administrative decisions under the Act, venue was not properly laid in federal district court, and the appropriate form of action was a damages action, not a suit for equitable relief. 5 U.S.C. 703 ("The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute.").

City of Los Angeles v. *Lyons*, 461 U.S. at 101-102; it must be "distinct and palpable," *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975), or "certainly impending," *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289, 298 (1979). Furthermore, "the litigant must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990); see *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

Petitioners' claims of future economic injury rested on the proposition that the challenged Forest Service policy would reduce the quantity of timber available under future timber contracts and thereby cause economic harm to petitioners. Pet. App. 14a-15a. Applying settled principles of law, the court of appeals concluded that those claims were insufficient to confer standing because petitioners had not shown that their alleged injuries were likely to be redressed by a favorable decision. *Id.* at 15a-16a. The court found that it was "purely speculative" whether the relief requested by petitioners "would result in greater timber availability in the future." *Id.* at 15a. Petitioners disagree with the correctness of that determination, but the court's application of settled law to the particular circumstances of this case is not worthy of review.

In any event, the court of appeals correctly held that petitioners' claims of injury relating to future contracts were insufficient to confer standing. Assuming, as petitioners contend (Pet. 8, 18), that the temporary policy adopted in March 1989 reduced the quantity of timber available for harvest in fiscal years

1989 and 1990, a favorable decision now would not redress that result. Any future timber sales would still be subject to the requirements of the ESA and NFMA, and thus would have to comply with the Forest Service's Interim Standards and Guidelines for the management of RCW habitat. In short, there is no basis for concluding that an award of the relief petitioners seek with respect to the temporary policy would have any impact on the future availability of timber in Region 8, and petitioners have therefore not "shown an injury to [themselves] that is likely to be redressed by a favorable decision." *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976).

Moreover, the record in this case contains no evidence that the alleged reduction in available timber affected any bid that petitioners did or would have prepared for timber sales contracts during the affected years. Thus, petitioners have failed to "show the existence of any injury * * * of sufficient immediacy and ripeness to warrant judicial intervention." *Warth* v. *Seldin*, 422 U.S. at 516. "Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore* v. *Arkansas*, 495 U.S. at 158. Rather, such injury must be "certainly impending." *Ibid.* There is no standing with regard to the possible impacts of the policy on future timber sales to petitioners unless and until the policy "has an actual or immediately threatened effect" on petitioners. *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 894 (1990); see *id.* at 891.

The Ninth Circuit's decision in *Idaho Conservation League* v. *Mumma*, 956 F.2d 1508 (1992), is not to the contrary. In *Mumma*, the court held that the

plaintiff environmental groups had met the prerequisite for standing by showing personal injury-in-fact as a result of a Forest Service decision not to recommend wilderness designation of a number of roadless areas. *Id.* at 1514-1517. Petitioners failed to allege comparable personal injury resulting from issuance of the temporary policy at issue here, because they did not identify in concrete terms any injury they actually suffered or were about to suffer with respect to possible future contracts.[6]

Finally, petitioners' reliance (Pet. 21-22) on this Court's decision in *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 113 S. Ct. 2297 (1993), is unavailing. That case involved a claim by members of a particular group that they had been denied an opportunity to compete for a government benefit on an equal footing with members of other groups. The Court held that, in such cases, the plaintiffs need not allege that they would have been granted the benefit but for the unequal treatment, because the injury of which the plaintiffs complain is not "the ultimate inability to obtain the benefit," but rather "the denial of equal treatment." 113 S. Ct. at 2303.

In announcing that rule, however, the Court explicitly distinguished the situation of plaintiffs who make no claim of unequal treatment but instead assert that the denial of a particular government benefit is itself the injury that grants them standing. 113 S. Ct. at

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[6] Similarly unavailing is petitioners' reliance (Pet. 21 n.19) on cases permitting review of claims by disappointed bidders on federal contracts. Petitioners are not disappointed bidders; by definition, "future contracts" are contracts that have not been awarded.

2303-2304 (citing *Warth* v. *Seldin*, 422 U.S. 490 (1975)). Petitioners fall into the latter category. The injury of which they complain is not the denial of an opportunity to compete for timber contracts on an equal basis with other timber companies; rather, they claim that they were prospectively injured because the temporary policy reduced the availability of timber for *all* timber companies. Accordingly, the rule announced in *Northeastern Florida Contractors* is inapplicable on its own terms.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[7] Petitioners' reliance (Pet. 21) on *Ballerina Pen Co.* v. *Kunzig*, 433 F.2d 1204 (D.C. Cir. 1970), cert. dismissed, 401 U.S. 950 (1971), is misplaced for the same reason. In that case, the court of appeals held that entities that supplied ballpoint pens to the federal government had standing to challenge the government's decision to give a ballpoint pen contract bid preference to non-profit agencies for the blind, a category that did not include the plaintiffs. *Id.* at 1205-1206. Thus, the injury that gave rise to standing was the denial of equal treatment; petitioners make no such claim here.